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As a second ground for the exclusion of evidence unlawfully obtained by federal officers, it could be argued that the Court should adopt a judicial policy barring all evidence illegally obtained by state or federal officers as a means of suppressing illegal search and seizure within the state. Such a policy might be deemed warranted on the basis of modern developments in this area and on the basis of G. S. § 15-27 as indicative of legislative intent in this direction. This would go further than the federal rule which excludes only evidence illegally obtained by federal agents.

As a third basis for declaring inadmissible in North Carolina evidence unlawfully obtained by federal officers, it could be urged that a rule excluding the same should be adopted as the most effective means by which the Court can discharge its obligation to uphold the fourth amendment. As has been mentioned previously, this argument has been adopted by some of the courts which have acted on the question.

Without regard to the alternative merits of the bases suggested above for declaring inadmissible in the state courts evidence unlawfully acquired by federal officers, it is to be hoped that North Carolina will exclude such evidence should the question arise. The suppression of illegal search and seizure by federal agents can be rendered truly effective only by making it known in advance that any evidence taken in an illegal manner will be inadmissible in proving the guilt of the accused in either state or federal criminal proceedings.

JAMES C. FOX.

Constitutional Law—Requisites of Notice of Governmental Action

The United States Supreme Court cast new light on the requisites of notice under the due process clause of the Constitution in the recent decision of *Walker v. City of Hutchinson.*[1] The defendant city, in the exercise of its statutory power of eminent domain,[2] condemned property of the plaintiff for purposes of street widening. In accordance with the provision of the statute, the property owners were notified by publication that the hearing was to be held to determine compensation.[3] The Court found that the notice provided by the act was not reasonably calculated to inform a known resident landowner of condemnation proceedings against his property, and, therefore, that Fourteenth Amendment requirequirements of due process of law were not met. "Even a letter," it was

[1] 352 U. S. 112 (1956).
[2] KAN. GEN. STAT. § 26-202 (1949).
[3] In accordance with the statute, there was one published notice given in the official city newspaper ten days before the hearing. The Court, however, laid no stress on this point, but based its decision upon the inadequacy of notice by publication generally when some better means of giving notice is readily available.

said, "would have apprised him that his property was about to be taken."[4]

Upon the rationale of Justice Miller's widely cited dicta in *Davidson v. New Orleans*,[5] the Court has repeatedly sanctioned notice by publication in actions growing out of the powers of government.[6] This was a lower standard of notice than that imposed on others in comparable actions, but was considered justified and necessary for the expeditous handling of state business.[7] On this basis, notice by publication has been approved where the state was exercising its powers of eminent domain or taxing functions.[8] The *Walker* opinion, however, states broadly and unmistakably that there is nothing peculiar about governmental actions which justify depriving citizens of the right to be heard.[9] In discussing this proposition, Justice Black observed that often notice published in a newspaper is no notice at all, and that a more stringent requirement will prevent one-sided fixing of compensation by government officials. Answering Justice Miller's argument, the Court said it did not believe that compliance with this requirement would interfere with orderly condemnation proceedings.

Further indication of a policy change in notice requirements was given in *Covey v. Town of Somers*.[10] The Court held invalid that part of a New York statute[11] which provided that written notice to any taxpayer, including minors and incompetents, was sufficient for judicial foreclosure of tax liens in all cases. The authorities, it was said, *knew*

[4] Walker v. City of Hutchinson, 352 U. S. 112, 115 (1956).

[5] 96 U. S. 97, 104 (1878). "That whenever by the laws of a State, or by State authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole State or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections."

[6] Ballard v. Hunter, 204 U. S. 241 (1907) (tax foreclosure where statute provided for personal service on residents and notice by publication as to nonresidents); Leigh v. Green, 193 U. S. 79 (1904) (tax foreclosure where owner missing); Arndt v. Griggs, 134 U. S. 316 (1890) (judicial tax sale after notice by publication to nonresident owner); Huling v. Kaw Valley Ry. and Improvement Co., 130 U. S. 559 (1889) (condemnation of property of nonresident).

[7] Huling v. Kaw Valley Ry. and Improvement Co., 130 U. S. 559 (1889); Del Castillo v. McConnico, 168 U. S. 674, 677 (1898) (dictum).

[8] North Laramie Land Co. v. Hoffman, 268 U. S. 276 (1925) (eminent domain); Leigh v. Green, 193 U. S. 79 (1903) (taxation). See North Laramie Land Co. v. Hoffman, *supra* at 283: "All persons are charged with knowledge of statutes and must take note of the procedure adopted by them and when that procedure is not unreasonable or arbitrary there are no constitutional limitations relieving them from conforming to it. This is especially the case with respect to those statutes relating to the taxation or condemnation of land."

[9] Walker v. City of Hutchinson, 352 U. S. 112, 114 (1956).

[10] 351 U. S. 141 (1956).

[11] N. Y. TAX LAW § 165-h.

the property owner to be an unprotected incompetent and unable to understand the nature of the proceedings.[12] Thus a subjective standard of due process was used in an area in which it had formerly been considered necessary to have a fixed a minimum standard of notice for purposes of certainty and efficiency in governmental operation.

Despite what appears to be an important change in the Supreme Court's attitude toward notice requirements, neither the *Walker* nor the *Covey* decision expressly overruled prior decisions. In the former case the Court went to some length to distinguish a similar eminent domain case, *Huling v. Kaw Valley Ry. and Improvement Co.*,[13] which had approved published notice. There the landowner whose property was condemned, was a nonresident,[14] and the Court in the *Walker* opinion used this as the basis for distinquishing this previous case. It is significant, however, that the *Walker* opinion itself raises the question of the effect which *Mullane v. Central Hanover Bank and Trust Company*[15] may have had on the validity of this distinction, suggesting that the earlier holdings may have been "undermined."[16]

The *Mullane* case arose under a New York act[17] providing for notice by newspaper publication of judicial settlements of common trust fund accounts. The Court in deciding the case made no distinction between residents and nonresidents, but held published notice sufficient as to beneficiaries of the trust whose names and addresses were not known. However, as to those whose names and addresses were listed on trust company records, this notice was considered insufficient to satisfy the requirements of due process of law. Publication, it was said, is not likely to apprise anyone of the pendency of an action, but the mails, on the other hand, are an efficient and inexpensive means of informing those persons who are known to have an interest.[18]

The *Mullane* opinion was also notable for the Court's refusal to designate the proceeding as one either in personam or in rem. Even though there had been no clear holding of the United States Supreme Court to affirm the doctrine, it was generally considered that any action which could be classified as an in rem proceeding was one in which

[12] Covey v. Town of Somers, 351 U. S. 141, 146 (1956).
[13] 130 U. S. 559 (1889).
[14] The Supreme Court had indicated a reason for a different standard of notice as to nonresidents in Huling v. Kaw Valley Ry. and Improvement Co., *supra* note 13: "It is therefore the duty of the owner of real estate, who is a nonresident, to take measures that in some way he shall be represented when his property is called into requisition; and if he fails to do this, and fails to get notice by the ordinary publications which have usually been required in such cases, it is his misfortune, and he must abide the consequences." See Ballard v. Hunter, 204 U. S. 241, 248 (1906).
[15] 339 U. S. 306 (1950).
[16] Walker v. City of Hutchinson, 352 U. S. 112, 114 (1956).
[17] N. Y. BANKING LAW § 100-c(12).
[18] Mullane v. Central Hanover Bank and Trust Co., 339 U. S. 306, 310 (1950).

constructive service of process would suffice.[19] Yet because the classification of actions as in rem or in personam is based on confused and elusive standards which vary from state to state, the Court in the *Mullane* case felt that the power of the state to resort to constructive service should no rest on this scheme.[20]

Justice Jackson, in writing the opinion, carefully noted that the Court did not commit itself to any formula for "determining when constructive notice may be utilized or what test it must meet."[21] Nevertheless, twice in the past year, in the *Covey* and *Walker* cases, the Court has called up the *Mullane* case as authority in its examination of statutory notice requirements. Thus it appears that the present court has established the criterion "that if feasible, notice must be reasonably calculated to inform parties of proceedings which may directly and adversely effect their legally protected interests."[22]

Reading the *Mullane, Covey* and *Walker* cases together, it appears that the elements of notice satisfactory to due process of law are to be determined by the peculiar facts of each individual case, and that set rules in the field of constructive notice will no longer be given recognition. As in other areas,[23] it seems that the Court is substituting a subjective standard of due process for the prior standards which, on the surface at least, embodied greater objectivity and certainty.

The *Mullane* case in 1950 started a rash of speculation[24] that the

[19] In Pennoyer v. Neff, 95 U. S. 714 (1878), Justice Field drew a distinction between the notice required for in personam and in rem actions. The Court said that in personam judgments based upon publication of process would be "instruments of oppression," and suggested by way of dictum that constructive service by publication "may answer in all actions which are substantially in rem." *Id.* at 727. Leigh v. Green, 193 U. S. 79 (1903), sustained a Nebraska statute providing for notice by publication of in rem proceedings to forclose tax liens, and discussed the classification at length: "When proceedings are in personam . . . the person must be served with process; in proceeding to reach the thing, service upon it and such proclamation by publication as gives opportunity to be heard upon application is sufficient to enable the Court to render judgment." *Id.* at 85. And, Grannis v. Ordean, 234 U. S. 380, 384 (1913), noted that in determining what is due process "a distinction is to be observed between actions in personam and actions in rem or quasi in rem." The distinction however, was not germane to the holding in this instance. See Fraser, *Actions in Rem,* 34 CORN. L. Q. 29, 40 (1948), where this authority explained: "Notice in actions in rem is to be distinguished from service of process in actions in personam because notice may be given a person even though he is outside the territorial limits of the court, since jurisdiction over the person is not necessary in actions in rem." See also 1 NICHOLS, EMINENT DOMAIN § 4.103[2] (1950).

[20] Mullane v. Central Hanover Bank and Trust Co., 339 U. S. 306, 312 (1950).

[21] *Id.* at 314.

[22] Walker v. City of Hutchinson, 352 U. S. 112, 114 (1956).

[23] *E.g.,* the manner in which the Court determines if due process of law has been satisfied in criminal cases: Breithaupt v. Abram, 77 Sup. Ct. 408 (1957); Irvine v. California, 347 U. S. 128 (1954); Rochin v. California, 342 U. S. 165 (1951); Malinski v. New York, 324 U. S. 401 (1944). The Court in these cases said that under the Due Process Clause, it may nullify a state law if its application "shocks the conscience," or offends "a sense of justice."

[24] Fraser, *Jurisdiction by Necessity—An Analysis of the Mullane Case,* 100 U.

validity of state statutes and court rules relating to notice by publication would be limited, especially as applied in probate proceedings and other actions similar to common trust settlements. This was followed by statutory changes[25] varying considerably in their provisions and in the scope of their coverage. *The Walker* decision calls for a close reexamination of notice requirements in all of the states, and for provision to be made for at least a letter in all cases where an address is available.[26]

JOHN L. DAVIDSON.

Credit Transactions—Deficiency Judgment Statute—Suit on the Note

In *Fleishel v. Jessup*,[1] plaintiff was holder of promissory notes secured by deed of trust executed by defendant for the purchase price of land, equipment, and machinery. After sale, plaintiff sued for deficiency judgment. The trial court excluded defendant's evidence bearing on the question of whether certain structures were real or personal property. Judgment for plaintiff was reversed on appeal on the ground that defendant was entitled to have the jury decide the question of what proportion of the value of all the property was realty.[2] As to such proportion plaintiff was not entitled to deficiency judgment under G. S. § 45-21.38.[3]

PA. L. REV. 305 (1952); Hayward, *The Effect of Mullane v. Central Hanover Bank and Trust Company Upon Publication of Notice in Iowa*, 36 IOWA L. REV. 47 (1950); Tilley, *The Mullane Case: New Notice Requirements*, 30 MICH. ST. B. J. 12 (1951).

[25] IOWA RULES CIV. P., Rule 60 (1943) (revised in 1951 so that now in all cases of service of original notice upon known persons by publication, a copy of the notice must be sent by ordinary mail to such person); ME. REV. STAT. 114 § 7 (1954) (common trust fund statute whose notice provisions were influenced by the Mullane case); MICH. STAT. ANNO. § 27.3178(32) (1943) (revised in 1951 to require mailing of all probate and other legal notices); OKLA. STAT. ANNO. TITLE 60 § 162 (Supp. 1951) (common trust fund statute).

[26] *Quaere* the validity of N. C. GEN. STAT. § 105-377 (1950), which states: "All persons who have or may acquire any interest in any property which may or may become subject to a lien for taxes are hereby charged with notice. . . . Such notice shall be conclusively presumed, whether such persons have actual notice or not." Also, N. C. GEN. STAT. § 160-219 (1952), providing for notice by publication as to property owners who are nonresidents of the state when condemnation proceedings are brought by a municipal corporation.

[1] 244 N. C. 451, 94 S. E. 2d 308 (1956).

[2] The court points out that as between vendor and vendee, personal property affixed to land passes by a conveyance of the land unless expressly excepted. Horne v. Smith, 105 N. C. 322, 11 S. E. 373 (1890) (engine and boiler connected to main building of saw mill); Moore v. Valentine, 77 N. C. 188 (1877) (mining machinery); Bryan v. Lawrence, 50 N. C. 337 (1858) (planks laid down, but not nailed, on the upper floor of gin house). As between landlord and tenant, fixtures placed on the land for purposes of trade are removable by the tenant at the expiration of the term without provision in the lease for removal. Springs v. Atlantic Refining Co., 205 N. C. 444, 171 S. E. 635 (1933), Note, 12 N. C. L. REV. 273 (1934).

[3] *Cf.* CALIF. CODE CIV. PROC. § 580 (b) (1955), which provides that where both a chattel mortgage and real estate deed of trust are given to secure payment of the balance of the combined purchase price of real and personal property, no deficiency